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March 3, 2025

Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 23-0676; *Cactus Water Services, LLC v. COG Operating, LLC*

To the Honorable Members of the Supreme Court of Texas:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this letter in the above-referenced cause in support of the El Paso Court of Appeals' decision.

Statement of Interest

The Texas Civil Justice League ("TCJL") is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair, stable, and predictable civil justice system. TCJL has long participated as *amicus curiae* in matters that have a significant and pervasive impact on our membership and the Texas business climate.

TCJL has a particular interest in this case because of our history of seeking policy changes to encourage the treatment of fluid oil and gas waste for subsequent beneficial use. TCJL has a particular interest in this matter because we played a central role in advocating for the enactment of Chapter 122, Natural Resources Code, in 2013. Although not directly relevant to the determination of the issue before the Court, this statute deploys the very definition of "fluid oil and gas waste" that *is* an issue in this case. We believe that it might be useful to the Court to understand the statute in the broader context of longstanding Texas law governing the handling and treatment of such waste.

This brief has been prepared in the ordinary course of TCJL's operations. No one has paid for the preparation of this brief.

Argument

The majority opinion of the court of appeals got this case right. By contrast, the dissenting opinion simply ignored the law, which is precisely what the Petitioner is asking this Court to do. As referred to above, Chapter 122 defines "fluid oil and gas waste" as "waste containing salt or other mineralized substances, brine, hydraulic fracturing fluid, flowback water, produced water, or other fluid that arises out of or is incidental to the drilling for or production of oil or gas." TEX. NAT. RES. CODE § 122.001. The statute goes on to specify that once the producer of the waste

transfers possession to another person "who takes possession of the waste for the purpose of treating the waste for subsequent beneficial use," the waste "is considered to be the property of the person who takes possession of it" for that purpose," and that treated product transferred to another person for subsequent disposal or beneficial use "is considered to be the property of the person to whom the material is transferred." TEX. NAT. RES. CODE §§ 122.002(1), (2). So, under current law, unless an oil and gas lease or other binding agreement *expressly* states otherwise, title to fluid oil and gas waste passes from the producer to the owner of the treatment facility and, finally, to an end user.[1]

The Legislature did not write the statute out of whole cloth. Chapter 122 uses a definition of "fluid oil and gas waste" that is consistent with (1) decades-old Texas law, (2) standard industry practice, and (3) the Legislature's public policy choice to inventivize the recycling and treatment of such waste for a subsequent beneficial use. The language of Chapter 122 is furthermore consistent with the 60-year-old

[1] For purposes of additional context, legislation has been introduced in the current legislative session to expand liability protection to the *producer* of fluid oil and gas waste or supplies or conveys such waste to a treatment facility for subsequent treatment of the waste to render it suitable for beneficial use. *See* S.B. No. 1399 and H.B. No. 3156, 89th Leg. Session, 2025. This legislation is part of a larger effort by the Texas Legisalture and the Railroad Commission to encourage and upscale the treatment of produced water. As the Commission put it in a January 10, 2024 news release, "the potential exists to reduce the amount of produced water that gets injected back into the ground, which can help reduce incidents of seismicity, as well as developing a potential water source for above ground use." https://www.rrc.texas.gov/news/011024-rrc-rolls-out-regulatory-framework-for-produced-water-recycling-pilot-studies/ (last accessed, February 26, 2025).

Railroad Commission "Rule 8" (cited below in its current form), first adopted in 1964 and subsequently amended on several occasions to strengthen the protection of fresh water from oil and gas activities.[2] In addition to limiting the treatment facility's tort liability for a subsequent use of the treated product (§ 122.003), the statute authorized the Texas Railroad Commission to adopt additional rules extending Rule 8 to establish permitting standards governing the recycling and treatment of fluid oil and gas waste. *See* 16 TEX.ADMIN.CODE Ch. 4, Subch. B, Divisions 4 and 5. As they have historically done, the rules define the term "oil and gas wastes" to include "saltwater, other mineralized water, sludge, spent drilling fluids, cuttings, waste oil, spent completion fluids, and other liquid, semiliquid, or solid waste materal." 16 TEX.ADMIN.CODE § 3.8(a)(26). Consequently, both the statutory definition of "fluid oil and gas waste" in Chapter 122 dovetails with Commission rules to consider various types of water as a waste product of oil and gas operations.

The gist of the dissenting opinion at the court of appeals is that an oil and gas lease reserves to the surface owner the waste product of producing that oil and gas. If that interpretation of the law is correct, then "waste containing salt or other

[2] For a history of Rule 8, see https://www.rrc.texas.gov/oil-and-gas/publications-and-notices/manuals/surface-waste-management-manual/chapter-ii-statewide-rule-8-history/ (last accessed February 28, 2025).

mineralized substances, brine, hydraulic fracturing fluid, flowback water, produced water, or other fluid that arises out of or is incidental to the drilling for or production of oil or gas" becomes the property of the surface owner immediately when it comes out of the ground. Not just the water, but *any and all* of the waste which contains some form of water. Why? Because under the reasoning of the dissenting opinion, the lease conveys *only* an interest in oil and gas and nothing else. Appellant would like to pick and choose which components of the waste stream to which it claims ownership, i.e. to have its cake and eat it. There is no time in Texas history in which an oil and gas lease just like the one at issue in this case has been read or understood as directing the waste stream back to the surface owner. If there had been, operators would have no need for permits to store, transport, and dispose of it or to construct the facilities to do that. If the surface owner indeed owns the waste, the surface owner should be the one getting the permit and bearing legal responsibility for its own property. Obviously, that is an absurd result that no oil and gas lease ever made contemplated for one second. Yet that is precisely what the Appellant seeks in this case. Be careful what you ask for.

There is another absurd aspect of the dissent's proposition that the surface owner owns the waste stream because it has water in it. But the opinion appears to subsume produced water into the general rule that the surface owner reserves ownership of the *groundwater*. If all water is the same, as the dissent would have it,

who is responsible for taking the appropriate measures to protect groundwater from potential contamination by the water produced from drilling activities? If the surface owner owns all the "water," shouldn't the surface owner bear some responsibility if the waste product the owner "owns" gets into the groundwater that the owner also owns? The Railroad Commission assigns the duty (and the cost) of handling the waste stream to the operator, who must take appropriate measures to keep it *out* of the groundwater, because Texas law has always treated the waste stream as belonging to the operator who made it. If the dissent's conclusion is correct, however, it would create irreconcilable conflicts between a judicial decision and Chapter 122 and Commission rules that would likely require wholesle revisions of the statutory and regulatory framework. This result makes no sense from a legal, regulatory, or economic standpoint. If the surface owner owns the waste and wants to monetize it, the surface owner should get *all* of the costs associated with that ownership, not just the economic benefits.

Just one more thing. Fluid oil and gas waste does not come out of the ground already separated into its constituent parts. If the surface owner has title to that waste, the surface owner should be responsible for fractionating it to recover the treatable produced water from the waste stream. The surface owner would then be left with the residue, which has to be disposed of in some way. As we noted at the outset, current law is clear that the operator that produces the waste is responsible

for its treatment, reuse, or disposal, whether the operator does the job itself or contracts with somebody else to take the waste—and the liability for it—off its hands. The dissent's misinterpretation of *both* the law *and* the lease not only makes Chapter 122 a dead letter, it upends the whole legal, regulatory, and operating framework that has been in place in Texas for decades. That simply cannot be right.

Finally, if the dissenting opinion is a correct statement of the law, it will rewrite, by judicial fiat, pretty much every oil and gas lease in the state. As we have observed above, it will also require a new statutory and regulatory structure that redistributes the cost and liability of handling, treating, and disposing of fluid oil and gas waste from the operator to the surface owner, who will generally have neither the financial resources nor the necessary expertise to do it. If the Appellant and *amici* supporting the Appellant's position want to change the law, we encourage them to ask the Legislature to do that, rather than putting this Court in a position that it has steadfastly declined to accept.

Conclusion and Prayer

TCJL respectfully requests that this Court affirm the court of appeals.

Respectfully Submitted,

/s/ George S. Christian
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CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,594 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus* letter was served on counsel of record by using the Court's CM/ECF system on the 3d day of March, 2025.

/s/ George S. Christian